3-5-2010

Curtis-Klure PLLC v. Ada Cty. Highway Dist. Appellant's Reply Brief Dckt. 36647

IN THE SUPREME COURT OF THE STATE OF IDAHO

CURTIS-KLURE, PLLC, dba MAPLE GROVE DENTISTRY, and JACK D. KLURE, D.D.S.,

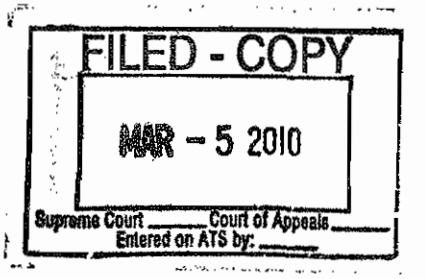
Appellants.

vs.

ADA COUNTY HIGHWAY DISTRICT,

Respondent.

Docket No. 36647



APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada

The Honorable Deborah A. Bail, District Judge, Presiding

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I. STATEMENT OF THE CASE

Curtis-Klure, PLLC, dba Maple Grove Dentistry and Jack D. Klure, D.D.S. (together "Maple Grove") appeal from the District Court's dismissal of their lawsuit against the Ada County Highway District ("ACHD"). Maple Grove claims business damages from ACHD under Idaho Code § 7-711(2) based upon the taking of real property ("Project Property") that ACHD needed for its Ustick Road widening project in Boise ("Project").

At its heart, this case presents a question of first impression under Idaho law: is an established business entitled to bring an action to recover damages caused by a taking of adjacent property by a governmental entity? The Idaho Legislature's plainly expressed intent requires an affirmative answer. Moreover, this Court has already rejected an effort to place requirements upon a qualifying business to recover such damages beyond the elements of the applicable statute. Once it is confirmed that an established business may assert its claim, it is a short road to the conclusion that Maple Grove satisfies the elements of the statute. On the other hand, even if this Court decides that an established business does not have a right to bring such a claim, then Maple Grove is still entitled to recover because it has demonstrated a taking of a property interest sufficient to support an inverse condemnation action.

II. ARGUMENT

A. An Established Business Can Bring an Action for Damages under Idaho Code § 7-711(2).

Idaho Code § 7-711(2) provides that "any business qualifying under this subsection having more than five (5) years' standing" is entitled to compensation for damages "which a taking of a portion of the property and the construction of the improvement in the manner

proposed by the [government entity] may reasonably cause." A qualifying business "must be owned by the party whose lands are being condemned or be located upon adjoining lands owned or held by such party."

In *City of McCall v. Seubert,* this Court upheld a straightforward interpretation of these statutory provisions against the city's argument that the businesses needed to prove an interest in the property being taken:

> . . . [T]he City's argument that an interest in remaining on the land sufficient to claim business damages must be proven by a written lease or agreement attempts to import a requirement into the statute that does not exist. **A business need only meet the statutory requirements of I.C. § 7-711 in order to make a claim for damages resulting from the taking of the underlying property.** "The right to receive business damages . . . resulting from a taking of land is strictly a statutory right . . . ." 29A C.J.S. Eminent Domain § 150 (2004).

City of McCall v. Seubert, 142 Idaho 580, 584, 130 P.3d 1118, 1122 (2006) (emphasis added).

ACHD does not dispute that an established business can assert a claim for business damages under I.C. § 7-711(2) where an eminent domain proceeding has been initiated by the governmental entity or an inverse condemnation action has been filed by the owner of the real property. Instead, ACHD's position is that an established business cannot recover damages in situations where the governmental entity is able to negotiate the purchase of the property. [1]

This Court is familiar with the standards for statutory construction.

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[1] This is apparently the District Court's view as well. Although the court did not explicitly address the implied right of action issue, it consistently treated Maple Grove's claims as inverse condemnation claims. See R., p. 104 ("Dr. Klure is required to establish that ACHD has engaged in a 'taking' of his interest in the property.").

> When interpreting a statute, this Court must strive to give force and effect to the legislature's intent in passing the statute. *Davaz v. Priest River Glass Co., Inc.*, 125 Idaho 333, 336, 870 P.2d 1292, 1295 (1994). "It must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole." *McLean v. Maverik Country Stores, Inc.*, 142 Idaho 810, 813, 135 P.3d 756, 759 (2006) (citations omitted). "Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction." *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999). However, if the result is "palpably absurd," this Court must engage in statutory construction. *Id.* When engaging in statutory construction, this Court has a "duty to ascertain the legislative intent, and give effect to that intent." *Id.* "[T]he Court must construe a statute as a whole, and consider all sections of applicable statutes together to determine the intent of the legislature." *Davaz*, 125 Idaho at 336, 870 P.2d at 1295 (internal citation omitted). "[The Court] also must take account of all other matters such as the reasonableness of the proposed interpretations and the policy behind the statute." *Id.*

Wheeler v. Idaho Dept. of Health and Welfare, 147 Idaho 257, 263, 207 P.3d 988, 994 (2009).

7-711(2) undeniably allows a qualifying business to recover damages caused by a taking. ACHD's interpretation of Idaho's eminent domain statute would create a right without a remedy in matters in which the government is able to negotiate a purchase of the property. It would leave established business owners at the mercy of the condemning entity and the property owner. A governmental entity would be encouraged to overpay for the real property in order to cut off the right of any qualifying business to make a claim. This proposed interpretation conflicts with the intent of the Idaho Legislature, which was to provide compensation to qualifying business owners who are affected by public takings.

The ability of an established business to assert its claim for damages under I.C. § 7-711(2) is confirmed by Idaho Code § 7-709. That section provides:

> All persons in occupation of, or having or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead, and defend each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint.

An established business that meets the requirements of I.C. § 7-711(2) is a person with an interest in the damages for the taking of the property and therefore may "appear, plead and defend" to the same extent as if they had been named in a complaint for condemnation.

Maple Grove concedes that the statute does not explicitly provide for the filing of a complaint by a qualifying business owner, but it does not provide for the filing of a complaint by the property owner, either. This Court has repeatedly recognized a property owner's right to initiate an inverse condemnation action. To deny a qualifying business an opportunity to assert its claim for damages on the ground that the governmental entity was able to negotiate a purchase of the real property inserts requirements into the statute that do not exist, renders portions of I.C. § 7-711(2) superfluous, and is contrary to the clearly expressed intent of the legislature to provide compensation to qualifying businesses.

There is no requirement in 7-711(2) or 7-709 that a qualifying business also possess an interest in a portion of the property being condemned, which is precisely the requirement that ACHD seeks to impose. Indeed, such a requirement would contradict the plain language of those statutes and is exactly the same argument rejected by this Court in *Seubert*. A business may qualify for damages by virtue of being **adjacent** to the condemned property. A person has

standing to appear, plead, or defend by having an interest in the **damages** arising from the taking. If a qualifying business must also be an owner of the property being condemned in order to assert such a claim, then those portions of the statutes are unnecessary.

Finally, there is no logical reason that the Idaho Legislature would have intended to condition its grant of a right to damages to a qualifying business upon the inability of the government to negotiate a purchase of the property.[2] The Idaho Legislature, having provided a right to damages for qualifying businesses, must also be presumed to have intended those qualifying businesses to be able to assert their claims without being dependent upon an action brought by the government or the property owner. The Idaho Supreme Court recognized more than ninety years ago that "if the plaintiff can show that the [statutory] duty was imposed for his benefit, and that the Legislature had in mind his protection in passing the act in question, and intended to give him a vested right in the discharge of that duty, then this will give him such an interest as will support an action." *State v. American Surety Co. of New York*, 26 Idaho 652, 671, 145 P. 1097, 1102-03 (1914).

More recently, this Court said, "When a statute is silent regarding private enforcement, courts may recognize a private right only when it is necessary to assure effectiveness of the statute." *Foster v. Shore Club Lodge, Inc.*, 127 Idaho 921, 926, 908 P.2d 1228, 1233 (1995), (citing *White v. Unigard Mut. Ins. Co.*, 112 Idaho 94, 101, 730 P.2d 1014, 1021 (1986)). In both *Foster* and *White*, this Court concluded that the criminal statutes at issue did not provide for a

[2] This is particularly true given the fact that the legislature requires a governmental entity to negotiate in good faith as a prerequisite to a condemnation action.

private right of action because civil remedies were available elsewhere. Here, we have precisely the situation contemplated by the test described in *Foster* and *White* – I.C. § 7-711(2) is silent regarding private enforcement by a qualifying business in the absence of an eminent domain action, but the ability of a qualifying business to bring an action for compensation is necessary to assure the effectiveness of the statute and to implement the intent of the Legislature.

Florida's eminent domain statute is similar to Idaho's statute in that it provides for an award of damages to qualifying businesses and only provides for the commencement of an action by the government. Fla.Stat. Section 73.07(3)(b). In *State Dept. of Transp. v. Crews*, 227 So.2d 505, 506 (Fla.Dist.Ct.App. 1969), the court held that a lessee had an independent right to bring a claim for business damages despite the fact that the lessee was not a party to the principal action for condemnation of the property.

As this Court recognized in *Seubert*, an action for business damages resulting from a taking of private property for a public use is a statutory creation.[3] The Idaho Legislature adopted a provision that allows an established business to recover damages caused by a taking of adjacent property or the property upon which it is located. Regardless of whether the governmental entity files an eminent domain action or negotiates a purchase of the needed property, a qualifying business must be permitted to bring an action for damages caused by the taking.

[3] As opposed to a claim for just compensation for a taking of an interest in property, which is rooted in the constitution.

B. Maple Grove is Entitled to Recover its Business Damages.

1. Maple Grove is a qualifying business under I.C. § 7-711(2).

Having determined that an established business is entitled to bring an action for damages under I.C. § 7-711(c), the next question is whether Maple Grove meets the elements of the statute. The first requirement is that the business must have been in operation for more than five years. It is undisputed that Maple Grove operated in its location at the intersection of Maple Grove and Ustick for more than ten years. Therefore, the only question is whether Maple Grove was "owned by the party whose lands [were] being condemned or [was] located upon adjoining lands owned or held by such party." I.C. § 7-711(2)(b). ACHD does not dispute that Maple Grove was owned by the party whose property was purchased by ACHD. The Settlement Agreement reflects that the real property purchased by ACHD was owned by Dr. Curtis, who was an equal partner with Dr. Klure in Maple Grove. *See Seubert,* 142 Idaho at 580, 584, 130 P.3d 1118, 1122 (company qualified under 7-711(2) where its majority shareholder was the owner of the condemned property). In addition, Maple Grove was located upon land owned by Dr. Curtis adjacent to the Project Property. *Id.* (second company qualified under 7-711(2) because it was located on remaining property owned by Seubert and was adjacent to the condemned portion).

2. A sale under threat of condemnation is a taking.

ACHD attempts to avoid its statutory responsibility to compensate Maple Grove by claiming that I.C. § 7-711(c) does not apply because there was no taking of any of Dr. Curtis's

property. Instead, ACHD describes its purchase of the property owned by Dr. Curtis as a "negotiated, arms-length transaction . . . ." Respondent's Brief, p. 19.[4] Maple Grove's opening brief cited several authorities declaring that a sale in lieu of condemnation is equivalent to a taking. ACHD's attempts to distinguish these authorities fall flat.

ACHD acknowledges that, in *P.C. Management, Inc. v. Page Two, Inc.*, 573 N.E.2d 434, 437 (Ind. App. 1991), the Indiana Court of Appeals held that a conveyance in lieu of actual condemnation constitutes a condemnation proceeding. ACHD makes much of the fact that the court then refused to award damages to a plaintiff whose sublease had expired. Respondent's Brief, p. 24. The fact that the sublessee was unable to recover damages was the result of the specific terms of the lease at issue in that case. Regardless of the outcome, the Indiana Court of Appeals explicitly approved of the principle that a negotiated sale of property was tantamount to a taking.

ACHD next attempts to distinguish *Fuddy Duddy's v. State Dept. of Transp.*, 950 P.2d 773, 775 (Nev. 1997), in which the Nevada Supreme Court concluded that a purchase made under the threat of condemnation is the same as a judicial condemnation. ACHD argues that it could not have acquired the office building through eminent domain, but it does not (and indeed

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[4] The District Court found 7-711(c) inapplicable for the same reason. "Maple Grove Dentistry was a business which was in operation for over ten years so it met the requirement of having more than five years standing. Dr. Klure was a half-owner of Maple Grove Dentistry. However, the property was not taken by ACHD. It was sold by Dr. Curtis." R, p. 106. Later in the same discussion, the court said, "The reason ACHD acquired the Maple Grove Dentistry building is because of the voluntary, arms-length sale of it by the property owner, Dr. Curtis." *Id.* at 107. The District Court's analysis is off the mark because it focuses upon the sale of the building owned by Dr. Curtis where Maple Grove operated its dental practice rather than the strip of land along Ustick that was actually used for the road widening project.

cannot) argue that the same was true of the Project Property. ACHD also points out that the government in *Fuddy Duddy's* had passed a condemnation resolution while no such action was taken here by ACHD. This argument is disingenuous at best. The undisputed facts in the record show that the Project was well underway by the time the Settlement Agreement was reached in June 2007. In fact, construction had already begun pursuant to the Right of Way Agreement that was executed in November 2006. See R., Exh. 7, (Price Aff., ¶¶ 17, 20, 43). While it may be true that ACHD never passed a resolution directing the condemnation of Dr. Curtis's property, there is no doubt that a threat of condemnation existed because the Project Property would have been condemned if ACHD and Dr. Curtis had not been able to reach an agreement.

In *Lanning v. City of Monterey*, 226 Cal.Rptr. 258, 262 (Cal. Ct. App. 1986), the California Court of Appeals found that a sale of property to a city was the essential equivalent of its exercise of eminent domain. ACHD notes that the sales agreement in *Lanning* expressly acknowledged that the sale was in lieu of condemnation. Here, the Settlement Agreement says exactly the same thing even though it does not use the words "in lieu of condemnation," as can be seen in the following excerpts.

> WHEREAS, in connection with the Project, ACHD needs to acquire a portion of each of the Office Parcel, Parcel 45 and Parcel 44; and
>
> . . .

> B. In exchange for a full and complete release by Curtis, including their interest in Curtis-Klure, and in full and complete settlement of all claims by Curtis, arising from or relating in any way to the Project and/or the sale and acquisition by ACHD of the properties described in **Exhibits A, B and C** hereto, including any and all claims for damages of any kind or nature whatsoever, and specifically including claims for business damages under Idaho Code § 7-711, relocation expenses, and any other damage claims, and including claims for attorney fees and costs, ACHD shall pay the following sums:

R., Exh. 6, (Klure Aff., ¶ 8). These provisions reflect the fact that the transfer of property from Dr. Curtis to ACHD was not a voluntary sale but instead was part of a negotiated resolution of Dr. Curtis's claims arising from ACHD's acquisition of the property, including specifically **Dr. Curtis's share of Curtis-Klure's (Maple Grove's) business damages under 7-711.** If the transaction was simply a standard purchase of real estate, then why were these provisions necessary and why was Dr. Curtis compensated for his share of Maple Grove's business damages?

ACHD attempts to distinguish *Vincent v. Redev. Auth., Etc.*, 487 A.2d 1024, 1025 (Pa.Commw.Ct. 1985), in which the Pennsylvania Commonwealth Court held that a conveyance in lieu of condemnation constituted a condemnation proceeding, on the same basis as *Fuddy Duddy's* and *Lanning*. Nevertheless, the test adopted by the *Vincent* court was whether the events were "part of a proceeding which was directed toward condemnation, and which, indeed, would have resulted in the same but for the conveyance of the property by deed." *Id.* This test is easily satisfied in the present case.

To counter the authorities cited by Maple Grove, ACHD cites several cases allegedly demonstrating that the acquisition of the Project Property should not be considered a taking.

However, none of these cases undercut the principle that a sale under threat of condemnation is a taking.

First and foremost, the bulk of cases cited by ACHD do not involve a sale to a government entity. ACHD proves nothing by referencing cases in which negotiations[5] or threats,[6] standing alone, were held insufficient to constitute a taking. Maple Grove has never argued that such actions resulted in a taking of its property. Rather, a taking occurred because ACHD's actions resulted in its acquisition of Dr. Curtis's property, which would never have happened at all if not for the road widening project. Absent an actual transfer of property under threat of condemnation, the cases cited by ACHD provide no guidance.

Other cases are inapplicable because the property was not acquired under threat of condemnation. ACHD discusses two Texas cases at length, but the alleged threat of condemnation in these cases arose **after** the contract had been executed. *Gen. Serv. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001); *State v. Holland*, 221 S.W.3d 639, 641 (Tex. 2007). There were no sales under threat of condemnation; rather, each plaintiff argued that the state committed a taking when it rejected a claim for additional compensation under the contract. *Id.* This fact pattern has no bearing on the present case, where the purchase of the Project Parcel was clearly preceded by a threat of condemnation. Texas courts have held that such purchases are equivalent to a taking. *See, e.g., Schriver v. Tex. Dept. of Transp.*, 293

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[5] *Stahelin v. Forest Preserve Dist. of DuPage County*, 877 N.E.2d 1211 (Ill. 2007); *Eckhoff v. Forest Preserve Dist. of Cook County*, 36 N.E.2d 245 (Ill. 1941); *Ferrari v. U.S.*, 73 Fed.Cl. 219 (2006); *B.W. Parkway Assoc. Ltd. P'ship v. U.S.*, 29 Fed.Cl. 669 (1993).

[6] *Hempstead Warehouse Corp. v. U.S.*, 98 F.Supp. 572 (Fed. Ct. Cl. 1951); *U.S. v. Sponenbarger*, 208 U.S. 256 (1939); *Danforth v. U.S.*, 308 U.S. 271 (1939).

S.W.3d 846, 850 (Tex. App. 2009) ("a governmental entity cannot claim immunity from a landowner's claim for adequate compensation under [the takings clause] of the Texas Constitution, by contracting to purchase the property for a public purpose before initiating eminent domain proceedings"); *City of Carrollton v. Singer*, 232 S.W.3d 790, 800 (Tex. App. 2007) (rejecting argument that "because the [plaintiffs] voluntarily entered into an agreement with the City, they should not be allowed to now assert that the City has taken or attempted to take their property by eminent domain").

ACHD also summarizes two California cases, but these are distinguishable because the California Court of Appeal expressly found no evidence of any intent to condemn. Instead, both cases provided examples of open market transactions that were different from a sale under an implied or explicit threat of condemnation. Respondent's Brief at 32-35 (discussing *Pacific Outdoor Adver. Co. v. City of Burbank*, 149 Cal.Rptr. 906 (Cal. Ct. App. 1978) and *Langer v. Redev. Agency*, 84 Cal.Rptr.2d 19 (Cal. Ct. App. 1999)). These cases are very helpful in demonstrating the difference between governmental entities engaging in a commercial transaction versus attempting to avoid paying condemnation damages by privately acquiring property.

In the *Pacific Outdoor* case, the city negotiated a lease of railroad property for the purposes of beautification and parking. As a result of the city lease, the railroad terminated existing leases with Pacific Outdoor for the placement of billboards. The Pacific Outdoor leases were terminable upon 24 hours' notice. Both the trial court and the appeals court found that no taking of Pacific Outdoor's interest in the billboard leases had occurred because there was no

evidence that the city intended to condemn the property in the absence of the agreement with the railroad. The appeals court discussed prior cases in which an intent to condemn was present as follows.

> In both *Diamond Properties* and *Concrete Service* there is a definite and unequivocal manifestation that the public entity in question was ready to use its power to condemn, and in fact would clearly do so if necessary, to acquire the property at issue. Not only has Pacific failed to establish such a "calculated attempt" by Burbank, but all evidence is to the contrary. The personal property of Pacific was neither taken nor damaged by the respondent. The Railroad terminated the licenses held by the appellant, and it did so solely upon the motive of financial and other benefits which it foresaw as a result of leasing the said property to Burbank. Lacking an intent, or even an indication to condemn, the city was dealing in an open market transaction with the Railroad, and we are not ready to hold that a public entity is always liable for damages in an inverse condemnation suit when it concludes transactions in the open market.

Id. at 910. In the instant case, there is no evidence in the record to support the assertion that Dr. Curtis would have sold his property (including the Project Property) if not for the Project. Dr. Curtis sold out because his only other choice was to have the Project Property condemned and to litigate the issues of just compensation, remainder damages and business damages.

The *Pacific Outdoor* court included in a footnote the trial court's discussion of this issue at a hearing, which is particularly illuminating.

> "The Court: I think that has to be shown in a case like this. It was at least likely there would be a condemnation. In other words, to have inverse condemnation, you have to have a taking. A transaction that a city has with an outside vendor is not necessarily a taking. Cities, like other bodies, municipal and corporate, can do business without using their condemnation power. If, for example, this property, as I said, it was in the path of a bridge, or a freeway,

> or something else, which, although there was no resolution, it was inferrable from the circumstances that they were going to go forward with it anyway, no matter what would have happened, I would say your argument would apply, but we don't have that in the record."

Id., fn 4.

Here, we have exactly the situation described by the trial court judge in *Pacific Outdoor* – regardless of whether a resolution was adopted or an action was filed, the facts are undisputed that the Ustick widening project was going forward and would require a strip of Dr. Curtis's property adjacent to Maple Grove's building. Under these circumstances, there can only be one conclusion – that the acquisition of the property that was utilized for the Project was a taking.

The analysis in *Langer* is consistent. In that case, the plaintiffs claimed that they were entitled to damages resulting from the termination of their leases pursuant to a development agreement between their landlord and a private developer. The developer had a separate agreement with the local redevelopment agency to provide funding for the project. The court denied the tenants' claims for compensation because the agency never intended to condemn and never acquired the property at issue. The acquisition of the parcels upon which the plaintiffs' businesses were located was a matter of contract between the landlord and the developer.

> Applying this case law to the undisputed facts before us, we find there was no substantial equivalent of condemnation here. Appellants contend the evidence shows that the Agency "orchestrated" the termination of the leases, similar to the circumstances in *Diamond Properties*, where the public agency privately purchased the property on the condition that the owner terminate the tenancies. *Diamond Properties* is quite different, however. In that case it was clear that the public entity intended to use its power of condemnation and in fact actually filed a

> condemnation action, which it later dismissed. The private purchase by the entity, conditioned on delivery of the property free of tenancies, was therefore clearly in lieu of condemnation.
>
> Here, on the other hand, the evidence shows that the plans for developing the properties were initiated by Cypress and Scherer, who sought assistance from the Agency in acquiring other properties in the area. The Agency never acquired the Scherer properties. Unlike *Concrete Service, Diamond Properties* and *Lanning*, there was no notice of condemnation nor any threat of condemnation of the Scherer properties, nor any evidence that the Agency intended to condemn those properties for redevelopment of the area. Indeed, in all of the owner participation agreements, the Scherer properties were in the group of parcels which were already under the control of Cypress and thus did not require acquisition by the Agency.

84 Cal.Rptr.2d at 24.

There is no question here that ACHD intended to acquire the Project Property and therefore acquired it under threat of condemnation. In such cases, the California courts routinely hold that a taking has occurred. *See, e.g., Lanning*, 226 Cal.Rptr. at 262; *Concrete Service Co. v. Dept. of Public Works, Div. of Highways*, 78 Cal.Rptr. 923, 926 (Cal. Ct. App. 1969) (where agency unequivocally expressed intention to take property for freeway purposes, negotiated sale constituted condemnation or its substantial equivalent); *Redev. Agency of City of Stockton v. Diamond Prop.*, 76 Cal.Rptr. 269, 272 (Cal. Ct. App. 1969) (agency acted as condemnor where, after filing condemnation complaint, it induced property owner to terminate plaintiff's tenancy as condition of purchase).

Only one case cited by ACHD involved a sale under threat of condemnation, and even this case is inapplicable. In *Knop v. Gardner Edgerton Unified Sch. Dist. No. 231*, 205 P.3d 755

(Kan. Ct. App. 2009), the plaintiffs sold their property to a school district in order to avoid eminent domain proceedings. Less than two years later, the school district chose not to build a school and instead sold the property to a developer for a profit of approximately one million dollars. A Kansas statute provided, in relevant part:

> If, within 10 years after **entry of final judgment under K.S.A. 26-511**, and amendments thereto, the school district fails to construct substantial buildings or improvements that are used for school purposes on any real property acquired under this subsection, the school district shall notify the original owners or their heirs or assigns that they have an option to purchase the property from the school district for an amount equal to the compensation awarded for the property under the eminent domain procedures act.

K.S.A.2008 Supp. 72-8212a(a) (emphasis added). When the plaintiffs attempted to enforce this statutory right, their claim was rejected because there had been no "entry of final judgment" in an eminent domain proceeding. The Kansas Court of Appeals acknowledged "the perceived inequities presented by the outcome," but it could not circumvent the statutory language. *Knop*, 205 P.3d at 766. Although the court distinguished between acquisitions under a threat of condemnation and acquisitions via "entry of a final judgment" for the purposes of the specific statute at issue, it never held that an acquisition under a threat of condemnation is not a taking. Consequently, *Knop* provides no support for ACHD's proposition that a negotiated sale of property that would otherwise be the subject of an eminent domain action should not be considered the equivalent of a taking for the purpose of applying I.C. § 7-711(2).

There is ample evidence in the record demonstrating that the Project Property was sold to ACHD under threat of condemnation. The first correspondence sent to Dr. Curtis from ACHD

explained that "this project will affect your property located within the project boundaries," then went on to describe the property acquisition process. R., Exh. 7 (Price Aff. at ¶ 35, Exh. H). This letter was also accompanied by a document entitled "SUMMARY OF THE RIGHTS OF AN OWNER WHEN ADA COUNTY HIGHWAY DISTRICT SEEKS TO ACQUIRE PROPERTY THROUGH ITS POWER OF EMINENT DOMAIN." *Id.*

Later, the Right of Entry Agreement executed by Dr. Curtis and ACHD on November 10, 2006 unequivocally stated: "In order to complete the Project it will be necessary for ACHD to acquire the ... [p]ermanent easement on, over and across the real property as described on Exhibit 'B'," which included the Project Property. *Id.* (Price Aff. at ¶ 43, Exh. I, Section 1.2). The Right of Entry Agreement further provided that it would terminate only upon sale of the property, entry of an order of condemnation or the passage of two years, unless a condemnation action was pending. *Id.* at Section 3.

None of Dr. Curtis's property was for sale prior to the Project. Maple Grove intended to remain in its original location and would have done so were it not for the Project. R., Exh. 6 (Klure Aff. at ¶ 7); Exh. 9 (Klure Second Aff. at ¶ 4).

Finally, ACHD's general counsel testified that "[b]y reaching the settlement agreement with Dr. Curtis for the purchase of his Property, ACHD accomplished its goal of acquiring property by agreement, rather than through condemnation." R., Exh. 7 (Price Aff. at ¶ 52).

3. The fact that Dr. Klure Relocated his Practice in April 2007 is Immaterial.

ACHD also contends that Maple Grove is not entitled to assert a claim for business damages under 7-711(2) because, even if a taking of a portion of Dr. Curtis's property occurred,

Dr. Klure had already relocated his practice and any interest that he had in the subject property had terminated. This is wrong on the facts, as will be discussed below. It also ignores the purpose of the business damages provision in 7-711(2), which is to compensate qualifying businesses that are displaced by public projects, regardless of the technical legal status on the date of the transfer of the property. This Court addressed this issue in *Seubert*.

> The City argues Intervenors are not entitled to business damages under I.C. § 7-711 because they have no legally compensable interest in the underlying property. Because they do not own the property and do not have a written lease or agreement with Seubert to remain on the land, the City contends Intervenors have a mere unilateral expectation to continue to use the property or, at-most, a month-to-month lease.
>
> At the outset, this Court notes that the City's characterization of Intervenors as mere lessees with no right to remain on the property ignores the factual circumstances of this case, i.e., for over a decade, the Seubert family has made substantial expenditures of time and money to build and maintain the asphalt and concrete plants on the Seubert property in order to capitalize on the sub-surface sand and mineral deposits. The City offers no evidence that these family-run businesses will not continue on the Seubert property for the indefinite future.

142 Idaho at 584, 130 P.3d at 1122

Maple Grove stands in the same position as Valley and Clearwater in *Seubert*. Maple Grove operated at the same location for more than ten years and would have continued to operate at that location until its principals retired but for the decision of ACHD to widen Ustick Road. The bottom line is that ACHD's acquisition of Dr. Curtis's property that was needed for the Ustick Road widening project was the equivalent of a taking for purposes of 7-711(2), and Maple

Grove, as a qualifying business located on, or adjacent to, the condemned property, is entitled to recover the damages that it can prove were caused by the Project.

C. Maple Grove Had a Property Interest at the Time of the Taking.

Even if this Court holds that a qualifying business does not have the ability to bring an action for damages under 7-711(2), and instead must prove the elements of an inverse condemnation claim, Maple Grove is still entitled to recover its damages because it had a property interest in the land that was effectively condemned by ACHD.

1. The record indicates that Maple Grove's lease was still in effect on June 22, 2007.

ACHD insists that no taking occurred prior to the execution of the Settlement Agreement on June 22, 2007. Accordingly, ACHD repeatedly states that Dr. Klure did not have any interest in the subject property as of June 2007 because he vacated the Office Property in April 2007. Respondent's Brief, p. 1 ("Both the lease and the partnership ended in April 2007 when Dr. Klure left to practice at another location."), p. 2 ("Klure vacated the premises in April of 2007, ending the partnership and his month-to-month holdover tenancy under the expired lease."), pp. 6-7 (Prior to [June 22, 2007], Klure had decided to terminate his partnership with Dr. Curtis and relocate his practice."), p. 8 ("Klure had vacated the Dentist Office Property in April of 2007, ending his partnership with Dr. Curtis and ending his holdover tenancy of the lease on the Dentist Office Property that expired December 31, 2006.").

All of these statements are unsupported by the record and are misleading. ACHD deliberately refers to Dr. Klure as an individual claimant, despite knowing that both the claim for business damages under 7-711(2) and the leasehold interest belong to Maple Grove. ACHD's

allegation that the Maple Grove partnership terminated prior to June 2007 is pure fiction. The record shows that Maple Grove's lease terminated effective with the execution of the Settlement Agreement, which states that "the Curtis-Klure leases of the Office Parcel and other parcels described on Exhibits A, B and C **will be terminated** prior to closing." R., Exh. 7 (Price Aff. at Ex. J, Section H) (emphasis added).

In fact, the Settlement Agreement indicates that the lease and partnership were still in effect: "Dr. Klure, who **leases and shares** the office space in the Office Parcel as a member of Curtis-Klure, has no **ownership** interest in the Office Parcel or any common areas adjacent thereto." *Id.* (emphasis added). The use of the present-tense "leases and shares" establishes the existence of an ongoing lease. Furthermore, the Settlement Agreement declares only that Dr. Klure had no "ownership interest"; it does not declare that he had no leasehold interest. If Dr. Klure, via Maple Grove, had no remaining interest in the property, and the partnership was no more, then why was Dr. Klure a party to the Settlement Agreement at all? Why did ACHD pay Dr. Curtis for his share of Maple Grove's business damages?

2. The taking began when ACHD invaded the Project Property in November 2006.

Idaho law recognizes that a taking is established when a government entity permanently invades or interferes with a property interest. In *City of Lewiston v. Lindsey*, 123 Idaho 851, 853 P.2d 596 (Idaho Ct. App. 1993), the trial court dismissed the plaintiff's claim for inverse condemnation, finding that no taking occurred until the city filed an eminent domain action. The Idaho Court of Appeals upheld this determination, but its rationale is worthy of examination.

First, the Court of Appeals rejected the argument that no compensation was available for takings that occur prior to issuance of a summons for an eminent domain action:

> [I]f we were to construe the statute to prohibit compensation for takings which occur prior to the date of summons in eminent domain proceedings, it would effectively abolish the right to obtain the relief sought in inverse condemnation actions. This is because "the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."

Id., 123 Idaho at 857, 853 P.2d at 602 (quoting *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 316, 107 S.Ct. 2378, 2386 (1987)). The Court of Appeals went on to explain that, although it agreed that no taking occurred in that case before the city instituted eminent domain proceedings, its determination was "predicated on the court's factual finding that the City never interfered with [the plaintiff's] use of her property prior to that date." *Id.*, 123 Idaho at 858, 853 P.2d at 603.

Several other jurisdictions have likewise held that a taking occurs when a government entity permanently invades or interferes with a property interest. *See, e.g., Clay County Realty Co. v. City of Gladstone*, 254 S.W.3d 859, 864 (Mo. 2008) (landowner need not show physical taking where an invasion or appropriation of property right can be shown); *Rose v. City of Lincoln*, 449 N.W.2d 522 (Neb. 1989) (taking occurs when government entity exercises dominion over or appropriates an interest in private property); *Northern Pac. Ry. Co. v. Sunnyside Valley Irrigation Dist.*, 924, 540 P.2d 1387, 1390 (Wash. 1975) (invasion of private lands causing permanent or recurring damage constitutes unconstitutional taking); *Klopping v. City of Whittier*, 500 P.2d 1345, 1351 (Cal. 1972) (de facto taking occurs upon physical invasion

or direct legal restraint); *City of Buffalo v. J.W. Clement Co.*, 253, 269 N.E.2d 895, 902 (N.Y. 1972) (direct invasion of property or direct legal restraint on its use constitutes de facto taking).

In this case, ACHD concedes that it invaded the Project Property long before Dr. Klure moved his practice. Respondent's Brief at 16 ("[Dr.] Klure and Dr. Curtis continued their practices for some months during construction of the Project and while ACHD physically occupied the strip of land needed for the Project"). This invasion or interference was permanent; ACHD occupied the Project Property until it acquired title thereto. Thus, the appropriate date of taking for the Project Property is approximately November 2006, well before Maple Grove's leasehold interest was terminated.[7]

3. Maple Grove had an interest in the Project Property.

Because Maple Grove was located upon lands adjoining the Project Property, it is not required to prove a taking of its property interest in order to establish a right to business damages. I.C. § 7-711(2). Nevertheless, Maple Grove had the right to use the Project Property for ingress, egress and parking, and it received no compensation from ACHD when this right was taken for a public use. *See* R., Exh. 8 at ¶ 3 (providing that Lots 17 through 20 have a

[7] ACHD also refers repeatedly to the fact that the Maple Grove lease was not renewed and therefore converted to a month-to-month lease as of December 31, 2006. This is hardly surprising or significant. The Ustick widening project commenced in 2005. R., Exh. 7 (Price Aff., ¶ 17.) By early 2006, it was clear that ACHD needed to acquire some of Dr. Curtis's property for the project. *Id.*, ¶¶ 34-36. ACHD entered the Project Property and started construction in November 2006. There was no reason to renew the lease at the end of 2006 because, by that time, both Dr. Curtis and Dr. Klure knew that they would have to move their practices.

nonexclusive easement over Lot 16 for various uses, including ingress, egress and parking). This is also reflected in the Settlement Agreement executed by ACHD.

> WHEREAS, Curtis-Klure, PLLC dba Maple Grove Dentistry ("Curtis-Klure") is equally owned by Dr. Curtis and Jack D. Klure, D.D.S. ("Dr. Klure") and has leased the Office Parcel with concurrent rights in Parcels 44 and 45 from Curtis for operation of its dental practice since 1997; and

R., Exh. 6 (Klure Aff., Exh. 2).

Winn-Dixie Stores, Inc. v. Dept. of Transp., 839 So.2d 727, 730 (Fla.App.2 Dist., 2003), confirms that a taking occurs when a leasehold interest in common areas is taken without compensation. ACHD attempts to distinguish *Winn-Dixie* from the present case, but its arguments are without merit. ACHD first points out that Winn-Dixie involved a condemnation action, but, as discussed above, a sale in lieu of condemnation is equivalent to a condemnation action. ACHD claims that Maple Grove lacked a property interest at the time of the taking, but this is also wrong. Finally, ACHD notes that the lease in *Winn-Dixie* expressly addressed parking, including a separate fee for maintenance. Although Maple Grove's lease did not address parking, common sense dictates that parking was one of the benefits bargained for by Maple Grove. The building would have no value as a professional office unless there was an appurtenant right to access and parking in the common areas, which included the Project Property. The Settlement Agreement explicitly refers to these "concurrent rights." Given these facts, it seems reasonable to conclude that some portion of Maple Grove's $6835 monthly rent was attributable to parking and access on the Project Property.

D. Maple Grove Is Entitled to Recover Relocation Costs.

ACHD claims that Maple Grove cannot recover relocation costs because it did not follow the procedures outlined in the Idaho Highway Relocation Assistance Act, Idaho Code § 40-2001 *et seq.* However, 7-711(2) provides a separate basis for recovering relocation costs, as recognized by this Court in *Seubert*: "The language in I.C. § 7-711 (2)(b) ... does not preclude an award of relocation costs." 123 Idaho at 585, 130 P.3d at 1123. Consequently, Maple Grove's compliance with the Idaho Highway Relocation Assistance Act is immaterial.

E. Maple Grove's Losses Were Not Prevented by Relocation.

ACHD dips into the City of McCall's playbook one last time and asserts that Maple Grove is not entitled to business damages because it relocated its business. In support of this proposition, ACHD cites 7-711(2), which provides in part: "Business damages under this subsection shall not be awarded if the loss can reasonably be prevented by a relocation of the business ... or for damages caused by temporary business interruption due to construction."

This argument fails for several reasons. First, a significant portion of Maple Grove's business damages are losses incurred in the relocation process. These losses were **caused** by relocation, not mitigated by it.

Second, 7-711(2) does not preclude recovery of all losses suffered by a relocating business, only those losses that could reasonably have been prevented by relocation. As this Court explained in *Seubert*, the statutory language "merely serves to prevent a business from sitting on the condemned property and claiming business damages that could have been

mitigated by relocating." 123 Idaho at 585, 130 P.3d at 1123. There is no allegation anywhere in the record that Maple Grove engaged in such conduct; rather, ACHD is attempting to avoid paying business damages by arguing that Maple Grove relocated **too soon**.

Finally, the record reflects that Maple Grove is not merely seeking damages caused by temporary business interruption. In his second affidavit, Dr. Klure clearly stated his concerns about the completed project. R., Exh. 9 (Klure Second Aff., ¶¶ 2, 3). There is no evidence in the record to support ACHD's contention that the Project did not interfere with Maple Grove's dental practice.[8] While the nature and extent of the damage caused to Maple Grove by the Project is an issue that has not yet been addressed, the facts of this case demonstrate that some damage occurred. Otherwise, why would both Dr. Curtis and Dr. Klure decide that Maple Grove could no longer operate in the setting left by the Project? And, again, why did ACHD compensate Dr. Curtis for his share of Maple Grove's business damages?

F. Maple Grove Is Entitled to Recover Its Attorney Fees on Appeal if It Prevails in the Action.

A condemnee is entitled to recover its attorney fees if the condemnor does not reasonably make a timely offer of settlement of at least ninety percent of the ultimate jury verdict. *Ada County Highway District v. Acarrequi,* 105 Idaho 873, 877, 673 P.2d 1067, 1071 (1983). This also applies to qualifying businesses that are entitled to damages under 7-711(2). *Seubert*, 123 Idaho at 587, 130 P.3d at 1125.

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[8] ACHD cites to portions of Steve Price's Affidavit for support of this. Mr. Price's Affidavit is devoid of any facts that would indicate expertise on the subject of dental practices. His statements on the issue are not admissible evidence.

ACHD attempts to distance itself from these holdings by pointing out that the existence of a taking is "a threshold issue that must be established before an inverse condemnation action can be maintained." *KMST, LLC v. County of Ada*, 138 Idaho 577, 582, 67 P.3d 56, 61 (2003); *Covington v. Jefferson County*, 137 Idaho 777, 780, 53 P.3d 828, 831 (2002). However, in these cases, this Court was merely addressing the elements of an inverse condemnation claim, not a governmental entity's liability for attorney fees.

ACHD's primary concern appears to be that *Acarrequi* forces it to make a judgment call as to whether a settlement is warranted, without the benefit of first receiving a judicial determination. This hardly places ACHD in a unique situation. The law routinely expects individuals and entities to determine whether a given course of action will create liability for attorney fees. *Acarrequi* creates a strong incentive for government entities to carefully consider the merits of a claim, rather than delegating that burden to the judicial system.

Therefore, upon remand, if Maple Grove prevails in this action and recovers business damages against ACHD, then it will be entitled to its fees and costs, including those incurred this appeal, pursuant to Idaho Code § 7-718 and I.R.C.P. Rule 54(d)(1)(B).

III. CONCLUSION

Idaho's eminent domain statute contains the clearly expressed intent of the Idaho Legislature to compensate established businesses that are damaged by the taking of real property for public use. The undisputed facts in the record show that ACHD needed to acquire property at the intersection of Ustick and Maple Grove for the Ustick widening project, including property owned by Dr. Curtis and subject to the lease between Dr. Curtis and Maple Grove. By acquiring

the property for use in the project, ACHD triggered the application of Idaho Code § 7-711(2) and must compensate any qualifying business for the damages reasonably caused by the taking. Maple Grove is a qualifying business by virtue of being located upon adjoining property owned by Dr. Curtis. In addition, ACHD infringed upon Maple Grove's leasehold interest when it acquired property for the Project. Maple Grove should be permitted to proceed with proof of the damages reasonably caused by the Project.

For these reasons, Maple Grove respectfully requests that this Court reverse the judgment of the trial court and remand this action with the instruction that partial summary judgment be entered in Maple Grove's favor on the issue of Maple Grove's right to recover any business damages that it can prove were reasonably caused by the Project.

DATED This 5th day of March, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of March, 2010, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

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